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May 6, 1996

By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: Notice of Proposed Rulemaking
CS Docket No. 96-83

Dear Mr. Caton:

On behalf of CellularVision USA, Inc., enclosed please find an original and six (6) copies of its Comments filed in the above-referenced rulemaking proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner
Counsel for CellularVision USA, Inc.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Implementation of Section 207 of the Telecommunications Act of 1996

CS Docket No. 96-83

Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service

COMMENTS

CellularVision USA, Inc.¹ ("CellularVision"), by its attorneys, hereby files Comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

CellularVision is the parent of CellularVision of New York, L.P., which holds a commercial license to use the 27.5-28.5 GHz band in the New York Primary Metropolitan Statistical Area to operate a Local Multipoint Distribution Service (“LMDS”) video delivery system. CellularVision filed the Petition for Rulemaking and Petition for Pioneer’s Preference that prompted the Commission’s ongoing LMDS Rulemaking proceeding, in which the Commission has proposed to license LMDS in

¹ CellularVision USA, Inc. is publicly traded on the NASDAQ National Market under the symbol "CVUS."

Basic Trading Areas nationwide through spectrum auctions.² LMDS is a wireless, multi-cell, two-way video, telephony and data service that the Commission envisions will "compete with local exchange carriers in the provision of local exchange service, and with cable operators in the provision of video programming." *Id.*, para.27.

In the instant NPRM , the Commission has proposed rules to implement Section 207 of the Telecommunications Act of 1996 ("Telecom Act").³ Section 207 mandates that the Commission "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." *Id.*, 110 Stat. 114. In the NPRM, the Commission notes that Section 207 "is in accord with the objective, set forth in the Communications Act, to assure 'to all people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.'" *NPRM*, para.3.

Consistent with the intent of Congress in adopting Section 207 of the Telecom Act that state and local governmental and non-governmental bodies should not be permitted to impede the rapid deployment of competitive communications services,

² See In the Matter of Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Third Notice of Proposed Rulemaking and Supplemental Tentative Decision, CC Docket No. 92-297, FCC 95-287 (released July 28, 1995).

³ Telecom Act, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996).

the Commission should promulgate rules that extend the protections of Section 207 to LMDS. While Section 207 did not specifically mention LMDS – presumably because the Commission had not yet formally adopted rules for LMDS at the time of the Telecom Act’s passage – the same public policy reasons that prompted Congress to mandate such protections for the reception of broadcast, MMDS and DBS services, which at that time were licensed by the Commission, apply equally to LMDS, also a wireless competitor in the video marketplace. In the NPRM, the Commission recognized that in implementing Section 207 as to broadcast and MMDS, the FCC “is promoting two complimentary federal interests: (a) to ensure that consumers have access to a broad range of video programming services; and (b) to foster full and fair competition among different types of video programming services.” NPRM, para.2.

Clearly, these important federal interests apply equally to LMDS as well as to broadcast and MMDS services; accordingly, consistent with Congressional intent, LMDS should be treated similarly to broadcast and MMDS with respect to preemption of such local restrictions. Otherwise, if the prompt nationwide deployment of LMDS is hindered by the application of arbitrary state and local restrictions that impair a viewer’s ability to receive video programming with LMDS antennas, consumers will be denied full access to a new video programming service that already is providing important competition to cable in the New York PMSA, where CellularVision currently is licensed and provides a 49-channel video delivery system. Without similar preemption afforded to prospective LMDS licensees, full and fair competition among different types of video programming services simply will not exist, as LMDS and its

would-be subscribers will be at an inherent disadvantage to other competitors such as broadcast television, MMDS and DBS, who enjoy the benefit of federal preemption of state and local restrictions.

Moreover, notwithstanding the absence of an explicit Congressional mandate regarding LMDS within Section 207, the Commission has already established its broad authority to preempt state and local zoning regulations to receive satellite-delivered video programming – “. . . [(]not just the subset specifically singled out by Congress in [S]ection 207[)].”⁴ For example, in reaffirming its legal authority to promote satellite antennas, the Commission determined “that Section 1 of the Communications Act, mandating access to communications services by all people in the United States, together with numerous powers granted by Title III of the Act, and Section 705 of the Act . . . all establish the existence of a federal interest . . .” *Id.*, para.11. Additionally, in rejecting arguments against preemption because of the purported “wide availability of cable technologies,” the Commission once again reiterated its commitment “to ensuring access to all technologies including those that compete with cable.” *Id.*, para.15. Thus, as a multichannel video provider offering satellite-delivered programming, LMDS should be afforded similar protection as DBS and MMDS, as the Commission’s federal interest is equally significant and has the real potential to be obfuscated by unreasonable governmental or non-governmental

⁴ See In the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order and Further Notice of Proposed Rulemaking, IB Docket No. 95-59, para.16 (Released March 11, 1996).

restrictions.

Accordingly, consistent with the intent of Section 207 and the FCC's broad statutory-based preemption authority, the Commission should preempt state or local governmental and non-governmental restrictions that impair a viewer's ability to receive video programming with LMDS antennas. Further, since LMDS has two-way capabilities, such preemption should encompass restrictions that impair a viewer's ability to transmit information back to the hub, and thus should protect both subscriber receive antennas and subscriber transmit antennas.⁵

Respectfully submitted,

CELLULARVISION, USA INC.

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May 6, 1996

⁵ Consistent with these Comments, in a recent letter to Michele Farquhar, Chief of the Wireless Bureau, filed as an ex parte submission in the LMDS Rulemaking proceeding, CellularVision argued that the protections of Section 207 should apply to LMDS. See Letter from Michael R. Gardner and Charles R. Milkis, Counsel for CellularVision, to Michele Farquhar, CC Docket No. 92-297, April 4, 1996.

Certificate of Service

I, Ryan J. McCumber, hereby certify that copies of the foregoing "Comments" of CellularVision USA, Inc., were delivered by hand, on May 6, 1996, to the following:

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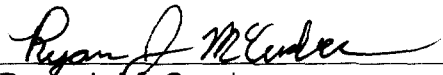
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